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No. 73-996

In the Supreme Court of the United States

OCTOBER TERM, 1973

GEORGE ERCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on three counts of willfully filing false income tax returns for the years 1965, 1966, and 1967, in violation of Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1). He was sentenced to concurrent terms of three years' imprisonment and fined $6,000. The court of appeals affirmed (Pet. App. 1A-10A).

Petitioner here raises two questions: (1) whether the erroneous withholding of Jencks Act material was harmless in the circumstances of this case, and (2) whether the jury was properly instructed with respect to the elements of willfulness. The court of appeals correctly answered each of these questions in the affirmative, in an opinion on which we principally rely. We add only the following points:

1. The decision below on the question of harmless error is consistent with *Clancy* v. *United States*, 365 U.S. 312. The Court in *Clancy* was concerned with materials which had never been subject to an in-court inspection; the Court's refusal to rule that the failure to produce those materials was harmless was based in part upon the state of the record. By contrast, here the court of appeals had the materials before it and scrutinized them carefully. See Pet. App. 4A. It was on the basis of this careful examination that the court determined that those materials were fully consistent with the testimony of the government's witness at trial. In further concluding that the district court's failure to order production was harmless error, the court of appeals thoroughly considered the possible uses to which the materials could have been put by defense counsel. See Pet. App. 5A-6A.[1]

2. The willfulness instruction given by the district court conforms with this Court's decisions in the cases cited by petitioner (Pet. 17). Moreover, contrary to petitioner's claim (Pet. 16), the instruction did not foreclose jury consideration of his defense that the false reporting on his tax returns was not willful. The jury was merely instructed that "willfulness *may* be inferred from a consistent pattern of understatement" (Pet. App. 8A; emphasis added). That instruction did not require the jury to find petitioner guilty. Moreover, the jury was fully instructed that it should acquit if petitioner "acted through negligence, inadvertence, mistake, or due to his good faith misunder-

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[1]Petitioner now contends, for the first time, that he should have been furnished the Jencks Act materials on appeal in order better to argue that failure to produce had been prejudicial. We are aware of no such right. Cf. *Rosenberg* v. *United States*, 360 U.S. 367. In any event, petitioner's failure to make that claim below precludes its assertion here.

standing of the requirements of the law" (Tr. 616)[2] or acted "in good faith * * * upon advice of his tax preparer" (Tr. 619).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[2]"Tr." refers to the reporter's transcript of the trial proceedings.